Nos. 07-21 & 07-25

IN THE

Supreme Court of the United States

Nos. 07-21

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

Nos. 07-25

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF STATE RESPONDENTS IN OPPOSITION TO THE PETITIONS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

In No. 07-21, the Petitioners include State Representative William Crawford (D-Indianapolis) and Township Trustee Joseph Simpson (D-Indianapolis), along with several non-profit political-interest groups, including United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition on Housing and Homeless Issues, and the Indianapolis Branch of the NAACP. The Respondents are the Marion County Election Board ("MCEB") and intervenor the State of Indiana.

In No. 07-25, the Petitioners are the Indiana Democratic Party and the Marion County Democratic Central Committee ("MCDCC"). Respondents are Indiana Secretary of State Todd Rokita, Indiana Election Division Co-Directors J. Bradley King and Pamela Potesta, and the MCEB.

This consolidated brief in opposition to both petitions is submitted by the State Respondents, *i.e.*, Secretary of State Rokita, Election Division Co-Directors King and Potesta, and the State of Indiana.

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STATEMENT

In 2005, the Indiana General Assembly, wading into a swamp of inflated voter-registration lists and nationwide reports of in-person voter fraud, enacted a law requiring in-person voters to show poll workers government-issued photo identification, such as a driver's license or passport. In response, two arms of the Democratic Party, two elected officials aligned with that party, and several political-interest groups have mounted these constitutional challenges to the new Voter ID Law. The courts below both quite reasonably and correctly concluded that Indiana's Voter ID Law does not impose a burden on voters that is qualitatively more severe than other more common election regulations, such as voter registration or even in-person voting itself. Pet. App. 7, 111.[1] What is more, none of the plaintiffs provided any evidence suggesting the Law might have a disparate impact on any disadvantaged groups, including racial minorities.

Most telling of all, despite the hue and cry about the supposed burdens of this Law, and despite all of the politicians, political-party apparatus, and political-interest groups in the case, no plaintiff could identify a single actual voter who could not or would not vote because of the Voter ID Law. This fact succinctly demonstrates why this case is unworthy of the Court's attention: It proves the Law is benign, and it creates substantial vehicle problems, not least of which is to undermine all plaintiffs' Article III standing.

1. In 2000, the Indianapolis Star investigated the accuracy of Indiana's voter-registration rolls and found that more than 300 dead people remained registered to vote. C.A.7 State App. 36. Subsequently, that study was the subject of testimony before Congress concerning the need

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[1] The two Petitions are nearly identical except for facts about each group of Petitioners. Unless otherwise noted, citations to the petitions are to the *Crawford* Petition and its Appendix.

for election-fraud-prevention measures. C.A.7 State App. 122. In 2005, the Indiana Supreme Court decided not to use voter-registration lists to compile jury pools because, according to Justice Theodore Boehm, the State's voter-registration lists "are overpopulated (because the lists included many [people] who had died or moved)." C.A.7 State App. 127.

For this case, Clark Benson, a nationally recognized expert in the collection and analysis of voter-registration and population data, conducted an examination of Indiana's voter-registration lists and concluded that they are among the most highly inflated in the nation. Pet. App. 39-40. Specifically, when he compared actual voter registration with self-reported registration, he found that, in 2004, there were 4.3 million registered voters, while only 3 million voters reported being registered, resulting in estimated list inflation of 41.4%. Pet. App. 40; C.A.7 State App. 62.

Benson also looked at the registration rates before and after the National Voter Registration Act became effective on January 1, 1995. C.A.7 State App. 63. He found that, in 1988, the registration rate in Indiana was 69.71% of voting-age population, with voter turnout of 75.67% of voting-age population. But in 2004, the registration rate was 93.6% of voting-age population (12 counties reported more registered voters than voting-age population), with voter turnout of 58.5% of voting-age population, indicating high list inflation. C.A.7 State App. 63. When he reviewed the number of deceased voters on the list, Benson found, with a high rate of confidence, that at least 35,699 Indiana registered voters were deceased. Pet. App. 40; C.A.7 State App. 64. Additionally, Benson's research showed 233,519 potential duplicate registrations in 2004. Pet. App. 40; C.A.7 State App. 65.

2. As documented by the district court, voter fraud is a problem of disturbing prevalence around the country. Pet.

App. 40-41. For example, in Washington, a court found that more than 1,600 fraudulent ballots were cast in the 2004 gubernatorial election, including ballots cast by the deceased and those who had already voted, as well as dozens that could not be accounted for on voter-registration rolls. Pet. App. 41. In Missouri, an investigation by the Secretary of State found that, in the 2000 election, over 1,000 fraudulent ballots were cast in just two of the State's counties, including 68 double votes, 14 votes cast by dead voters, and 79 vacant-lot voters. Pet. App. 41. In Wisconsin, a joint federal/state task force found that in the November 2004 elections more than 100 fraudulent ballots were cast using fake names and addresses. *See Ind. Democratic Party v. Rokita*, No. 1:05-cv-00634-SEB-VSS, Docket No. 82 Ex. 4, at 3-6 (S.D. Ind. Dec. 1, 2005). In Miami, newspapers reported that dozens, possibly hundreds, of people who lived outside the city limits illegally cast votes in the 1997 mayoral elections. Pet. App. 41. The blue-ribbon National Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker, recently issued a report addressing the problem of voters who misidentify themselves at the polls, declaring that "there is no doubt that it occurs." Pet. App. 41; C.A.7 State App. 13.

3. It was against this backdrop of bloated voter rolls and nationwide reports of in-person voter fraud that the Indiana General Assembly enacted the Voter ID Law in 2005. The Law requires citizens voting in person on election day, or those casting a ballot in person at a county clerk's office prior to election day, to present election officials with valid photo identification issued by the United States or the State. *See* Ind. Code § 3-11-8-25.1. The Law applies to voting at both primary and general elections. *See* Ind. Code §§ 3-10-1-7.2; 3-11-8-25.1. It does not apply, however, to receiving or casting an absentee ballot by mail, or to "a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code §§ 3-10-1-7.2(e); 3-11-8-25.1(f); 3-11-10-1.2. Senior

citizens (age 65 and older) and the disabled, among others, are automatically eligible to vote absentee and, therefore, do not need photo identification to vote. *See* Ind. Code § 3-11-10-24(a).

To be acceptable at the polls, government-issued photo identification must show the name of the individual to whom it was issued (which must conform to the name on the individual's voter-registration record) and an expiration date. *See* Ind. Code § 3-5-2-40.5. The expiration date must either not yet have occurred or have occurred after the date of the most recent general election. *See* Ind. Code § 3-5-2-40.5(3).

Voters are required to produce acceptable photo identification before signing the poll book. *See* Ind. Code § 3-11-8-25.1(b). If a voter does not provide proper identification, a member of the precinct election board "shall challenge the voter." Ind. Code § 3-11-8-25.1(c)(2). Upon being challenged, the voter may sign an affidavit attesting to the voter's right to vote in that precinct, and then sign the poll book and cast a provisional ballot. *See* Ind. Code § 3-11-8-25.1(d). A voter who casts a provisional ballot may appear before the circuit court clerk or county election board within ten days following the election to prove the voter's identity. *See* Ind. Code § 3-11.7-5-1. If at that time the voter provides acceptable photo identification and executes an affidavit swearing that the voter is the same individual who cast the provisional ballot, then the voter's provisional ballot will be opened, processed, and counted so long as there are no other non-identification challenges. *See* Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5. Alternatively, voters may validate their provisional ballots (again, within ten days of the election) by executing an affidavit attesting that the voter is the same person who cast the provisional ballot and either (1) is indigent and "unable to obtain proof of identification without payment of a fee" or (2) has a religious objection to being photographed. *See* Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c).

If, notwithstanding a voter's attempt to validate his provisional ballot using one of these methods, the county election board determines that the provisional ballot is invalid, then the voter may file a petition for judicial review in the local circuit court. *See* Ind. Code § 3-6-5-34. Ultimately, therefore, the meaning of any particular term within the Voter ID Law is subject to the interpretation of the Indiana Supreme Court. *See* Ind. Code § 4-21.5-5-16 (petitions for judicial review are appealable "in accordance with the rules governing civil appeals from the courts"); *see also* Ind. R. App. P. 5(A) (giving the Court of Appeals jurisdiction over final judgments of circuit courts); Ind. R. App. P. 56, 57 (allowing discretionary transfer from the Court of Appeals to the Supreme Court).

While voters who drive must continue to pay for drivers' licenses, the Voter ID Law forbids the State to charge a person who is of voting age and who does not have a driver's license a fee for non-license photo identification. *See* Ind. Code § 9-24-16-10(b). Renewals and replacements of non-license photo identification also must be free of charge. *See* Ind. Code § 9-24-16-10(a). Voters can obtain non-license photo identification by presenting a document containing the person's name and current address and at least one "primary document," such as a birth certificate, passport, military or veteran's identification card, or Indiana driver's education permit. *See* 140 Ind. Admin. Code § 7-4-3.

4. In No. 07-21 (the *Crawford* case), the Petitioners originally filed suit in Marion Superior Court against Respondent MCEB, presenting several state and federal constitutional and statutory challenges to Indiana's Voter ID Law. C.A.7 State App. 196-211. Meanwhile, the Petitioners in No. 07-25 filed a separate complaint in the Southern District of Indiana against Secretary of State Rokita and the Election Division Co-Directors. *See Ind. Democratic Party*, *supra*, Docket No. 1 (May 2, 2005). After MCEB removed

Crawford to federal court, the district court consolidated the two cases. *See Crawford v. Marion County Election Bd.*, No. 1:05-cv-00804-SEB-VSS, Docket Nos. 1, 12 (S.D. Ind. June 13, 2005). Because the matter called into question the constitutionality of an Indiana statute, the State of Indiana intervened as a party defendant. Pet. App. 17-18. Later, the Democrats added MCEB as a defendant in its case. C.A.7 State App. 141-56.

The district court ultimately upheld the Voter ID Law on cross-motions for summary judgment. Pet. App. 16. But before reaching the merits, the court reviewed whether the case was even justiciable, both because no one had been identified who would not vote because of the law, Pet. App. 81, 85, 90, 94, and because the defendant state officials have "no direct role in enforcing election laws." Pet. App. 23, 59 n.30. Specifically, the defendant state officials do not decide whether particular individuals may cast ballots or whether particular provisional ballots will be counted.[2] Nonetheless, the district court permitted the case to proceed on the theory that the plaintiffs could assert the rights of hypothetical voters not before the court who might not realize until they get to the polls that they do not have proper identification. Pet. App. 77-79, 85. And since the plaintiffs had managed to name at least one legitimate defendant—the MCEB—the court decided not to bother dismissing the case against the state officials. Pet. App. 59 n.30.

On the merits, the district court ruled that strict scrutiny does not apply to the Voter ID Law because there is no

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[2] It is the duty of the county election board—not state officials—"to determine whether to count a provisional ballot." Ind. Code § 3-11.7-5-2.5. The State Respondents cannot review a county election board's decision not to count a provisional ballot. *See id.* If an individual voter wishes to seek judicial review of a determination that a provisional ballot should not be counted, then the voter must sue the county board. *See* Ind. Code § 3-6-5-34.

evidence that any individuals or groups would "be forced to undertake appreciable burdens in order to vote." Pet. App. 101. Groups identified by the plaintiffs as particularly vulnerable to the Law's burdens, such as the elderly and the poor, do not need any identification to vote, the court observed, because they either are eligible to vote absentee or are exempted as indigent. Pet. App. 101-02 & n.70. Furthermore, although plaintiffs "concentrated their evidence and arguments on the burdens of obtaining a driver's license or identification card from the BMV," this evidence was "ultimately irrelevant" because there was no showing that any individuals or groups—including racial or socioeconomic groups—would find these burdens too onerous to surmount. Pet. App. 101. Thus, the court found the State's "important regulatory interest" in combating voter fraud sufficient to justify the Voter ID Law's "reasonable, nondiscriminatory restrictions." Pet. App. 108.

5. On appeal, in an opinion written by Judge Posner, the Seventh Circuit acknowledged that "[t]here . . . are no plaintiffs whom the law will deter from voting," yet held that the Democratic Party had standing on the theory that the Voter ID Law injures it "by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." Pet. App. 4, 5. And though the Indiana Democratic Party conceded that it does not have "members" as such, Pet. App. 47-48, and never demonstrated that anyone would be prevented from voting, Pet. App. 78, the court ruled that "[t]he Democratic Party also has standing to assert the rights of those of its members who will be prevented from voting by the new law." Pet. App. 4. Finally, the court stated that "[t]he standing of the many other plaintiffs in these consolidated suits—candidates, voters, organizations—is *less certain*, but need not be addressed." Pet. App. 4 (emphasis added).

On the merits, the court rejected the Petitioners' argument that any burden on the right to vote, however slight, must be subjected to strict scrutiny. Pet. App. 5-6. In fact, the court judged that "[a] strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger." Pet. App. 6 (citing *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5, 7 (2006) (per curiam)). The court observed that "[t]he Indiana law is not like a poll tax, where on one side is the right to vote and on the other side the state's interest in defraying the cost of elections or in limiting the franchise to people who really care about voting or in excluding poor people or in discouraging people who are black." Pet. App. 6. Rather, "[t]he purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to be an impairment of the right to vote." Pet. App. 6. Even the dissenting judge recognized that strict scrutiny did not apply, Pet. App. 11 (Evans, J., dissenting), as did other judges who voted to rehear the case en banc. Pet. App. 154-55 (Wood, J., dissenting from denial of petition for rehearing en banc).

The court also ruled that the Voter ID Law easily survives the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). The record shows at most a "slight" burden on voting because "few[]" voters "will actually disfranchise themselves rather than go to the bother" of obtaining photo identification. Pet. App. 5, 7. Yet, "[i]ndirect evidence of [voter] fraud, or at least of an acute danger of such fraud, in Indiana is provided by the discrepancy between the number of people listed on the registered-voter rolls in the state and the substantially smaller number of people actually eligible to vote." Pet. App. 8-9. The balance favors the State all the more because "the details for regulating elections must be left to the states, pursuant to Article I, section 4, of the Constitution," which in turn means "'that States may, and inevitably must, enact reasonable regulations of parties,

elections, and ballots to reduce election- and campaign-related disorder.'" Pet. App. 10.

REASONS FOR DENYING THE PETITIONS

Unless there is something inherently cert-worthy about *all* lower court decisions that uphold new voting regulations, there is nothing about this case that justifies this Court's review. No appellate court—state or federal—has ruled that voter-identification laws of any sort violate the United States Constitution. And, consistent with the wide latitude that the Elections Clause affords States over election mechanics, the Seventh Circuit applied the same balancing test to the Indiana Voter ID Law that circuits always apply to reasonable, non-discriminatory voting regulations, including voter-identification laws.

Petitioners' principal argument is that the Voter ID Law should be subjected to strict scrutiny because it imposes a "severe burden" on the right to vote. Pet. 19. But nowhere do they explain how that is so. They do not show, for example, that the Voter ID Law is somehow qualitatively more burdensome on voters than 30-day advance-registration or in-person-voting requirements. And their effort to prove that the Voter ID Law imposes a particularly difficult burden on the poor and elderly—two voting groups essentially exempt from the Law—failed when the district court ruled their proof inadmissible as "utterly incredible and unreliable." Pet. App. 60.

What is more, even if the constitutionality of voter-identification laws were to be of interest generally to the Court, this case suffers from substantial vehicle problems. First, the Article III standing of each of the plaintiffs in both cases is questionable at best—the two lower courts could not even agree on who had standing or why. Second, granting review of the issue now would likely prompt a raft of last-minute voter-identification challenges that would disrupt the

2008 presidential primaries. Third, in this case there is no record of the actual impact that voter-identification laws have on voting rates—a record that might inform a judgment about the level of burden imposed. Accordingly, even if the issue were otherwise cert-worthy, the Court would be wise to await a later case where it can be sure of getting to the merits, where it will not disrupt multiple elections, and where it will have a more comprehensive record to review.

I. Lower Courts Uniformly Apply The Constitutional Balancing Standard For Non-Discriminatory Election-Administration Laws And No Conflict Over Voter-Identification Laws Has Yet Emerged

Petitioners claim a "need to articulate the standard of review to be applied to voter identification laws." Pet. 22. Truth be told, there is no uncertainty whatever in this area of the law. Indeed, Petitioners do not even attempt to assert a lower court conflict as to either the validity of voter-identification laws or the standard to be used in assessing the validity of such laws. Their sole point of disagreement with the decision below is their largely fact-based contention that the Indiana Voter ID Law imposes a "severe burden" on the right to vote. Pet. 19. That contention, however, raises no substantial issue of law meriting review.

1. To begin, with respect to challenges of laws regulating election mechanics, such as voter-registration requirements, election-day procedures, and other election laws, federal circuits regularly apply the balancing test from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992) (explained in more detail in Part II.A., *infra*)—a test much more deferential than strict scrutiny. Perhaps equally significant, this Court denies review of such cases with equal regularity. *See Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006) (applying *Burdick* to an equal-protection challenge to touchscreen balloting), *cert. denied*, 127 S. Ct. 934 (2007); *Griffin v.*

Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) (applying *Anderson/Burdick* balancing to limitations on absentee balloting), *cert. denied*, 544 U.S. 923 (2005); *Coal. for Free & Open Elections v. McElderry*, 48 F.3d 493, 497 (10th Cir. 1995) (applying *Anderson/Burdick* balancing to Oklahoma's ban on write-in voting), *cert. denied*, 516 U.S. 813 (1995); *cf. Wit v. Berman*, 306 F.3d 1256, 1259 (2d Cir. 2002) (applying *Burdick* to a law prohibiting dual-residence citizens from voting in multiple local elections), *cert. denied*, 538 U.S. 923 (2003); *see also Gonzalez v. Arizona*, 485 F.3d 1041, 1049-50 (9th Cir. 2007) (applying *Burdick* to rule requiring first-time voters to present proof of citizenship at registration; no petition filed); *Werme v. Merrill*, 84 F.3d 479, 483-84 (1st Cir. 1996) (applying *Burdick* to requirement that certain poll workers be appointed by two largest political parties; no petition filed).

Moreover, all federal courts to consider *voter-identification laws* have applied *Anderson/Burdick* balancing. *See Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006) (applying *Burdick* to Georgia's photo-identification law); *see also ACLU of N.M. v. Santillanes*, 2007 WL 782167, at *25 (D. N.M. 2007) (applying *Burdick* to City of Albuquerque's photo-identification law), *appeal pending*, No. 07-2067 (10th Cir.); *Gonzalez v. Arizona*, 2006 WL 3627297, at *7 (D. Ariz. Sept. 11, 2006) (applying *Burdick* to in-person-voting identification requirements), *aff'd*, 485 F.3d 1041 (9th Cir. 2007); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 435 (E.D. Mich. 2004) (applying *Burdick* to federal first-time voter-identification requirements); *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) (same).

All state courts considering federal constitutional challenges to voter-identification laws have likewise applied *Anderson/Burdick* balancing. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, No.

130589, Slip Op. at 18 (Mich. July 18, 2007) (applying *Burdick* to requirement that in-person voters present photo identification or sign an affidavit stating that the voter does not have such identification); *Colo. Common Cause v. Davidson*, 2004 WL 2360485, at *3 (Denver Dist. Ct. Oct. 18, 2004) (applying *Burdick* to in-person-voting identification requirement).

2. Nor is there any conflict as to the ultimate constitutionality of voter-identification laws that needs to be resolved. So far, the Seventh Circuit is the only federal circuit to rule on the merits of a voter-identification-law challenge. The only state court of last resort to consider the matter has *upheld* a state voter-identification law under the United States Constitution. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, Slip Op. at 26. And the only state appellate court to *invalidate* a voter-identification law did so exclusively on *state*-law grounds. *See Weinschenk v. State*, 203 S.W.3d 201, 211-12 (Mo. 2006) (holding that Missouri's photo-identification requirement violated the state constitution, but expressly distinguishing the federal constitution and disclaiming any reliance on it).

To be sure, there are federal district courts that either have declared voter-identification laws invalid under the United States Constitution or are still considering such challenges. *See Santillanes*, 2007 WL 782167, at *2 (granting declaratory judgment invalidating photo-identification requirement enacted by local ordinance), *appeal pending*, No. 07-2067 (10th Cir.); *Common Cause/Ga.*, 439 F. Supp. 2d at 1345 (granting preliminary injunction against photo-identification law; permanent-injunction case remains pending). These cases will likely result in merits decisions by the Tenth and Eleventh Circuits, respectively. The best course is to reject this case, allow these federal circuits a chance to rule on the merits, and then assess whether the circuits are in conflict.

Petitioners impatiently argue that this case presents "a fundamentally important constitutional question that should *now* be resolved by this Court," even before a circuit conflict arises. Pet. 22 (emphasis added). But as the string of certiorari denials cited in Part I.1, *supra*, demonstrates, the Court has generally not waded into election-law disputes without at least *some* conflict that demands resolution. In fact, since *Anderson* set the balancing test for reasonable, non-discriminatory election regulations in 1983, aside from *Bush v. Gore*, 531 U.S. 98 (2000) (obviously *sui generis*), *Norman v. Reed*, 502 U.S. 279, 287 (1992) (where both sides filed petitions), and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (principally a party-association case), the Court has reviewed constitutional voting-rights challenges to state electoral-mechanics and ballot-access laws *only* where there was either a lower-court conflict or at least a preliminary invalidation of state law, as follows:

Lower-court conflict: *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 355-56 (1997) (resolving conflict between Seventh and Eighth Circuits over constitutionality of banning fusion candidacies); *Burdick*, 504 U.S. at 432 (resolving conflict between Fourth and Ninth Circuits over constitutionality of prohibiting write-in voting); *Anderson*, 460 U.S. at 786 (resolving conflict among First, Fourth, and Sixth Circuits over constitutionality of early-filing deadlines for independent presidential candidates).

Preliminary or final invalidation of election law: *Lopez Torres v. N.Y. Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (Feb. 20, 2007) (reviewing decision preliminarily enjoining New York's system for nominating state trial judges); *Wash. State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 1373 (Feb. 26, 2007) (reviewing decision invalidating Washington's top-two primary system); *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5, 6 (2006) (per curiam)

(reviewing decision preliminarily enjoining Arizona's voter-identification law); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (reviewing decision invalidating Oklahoma's semi-closed-primary law); *Cook v. Gralike*, 531 U.S. 510, 517-18 (2001) (reviewing decision invalidating discriminatory ballot-notation law); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 785-87 (1995) (reviewing decision invalidating Arkansas's ballot-access scheme for imposing term limits); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 211 (1986) (reviewing decision invalidating Connecticut's closed-primary law); *Munro v. Socialist Workers Party*, 479 U.S. 189, 191 (1986) (reviewing decision invalidating Washington's ballot-access law).

None of these usual justifications for review exists here. The Court should follow its ordinary course and let the issues presented percolate awhile. It can intervene in a later case if an actual conflict ever emerges.

II. The Decision Below Is Consistent With The Court's Holdings Concerning Reasonable Non-Discriminatory Election Regulations

Petitioners assert that the decision below "conflicts with decisions of this Court regarding the appropriate legal standard to be applied to cases involving severe burdens on the right to vote." Pet. 14. They fail, however, to explain how the Indiana Voter ID Law either imposes a "severe" burden on voters (a particularly glaring omission with a record that identifies no one unable to vote because of the Law) or differs in any other meaningful way from election-mechanics laws the Court has evaluated using *Anderson/Burdick* balancing. Again, there is no doctrinal uncertainty justifying review.

A. Well-established doctrine allows States great leeway to manage elections

The Court applies strict scrutiny to three categories of election laws: (1) those that impose *substantive* qualifications for voting, such as a one-year residency requirement, *Dunn v. Blumstein*, 405 U.S. 330, 332 (1972), or a property-ownership requirement, *Hill v. Stone*, 421 U.S. 289, 291 (1975); (2) those that infringe on separately enunciated constitutional rights, such as the right against poll taxes, *Harman v. Forssenius*, 380 U.S. 528, 529 (1965), *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966), and the right to travel, *Dunn*, 405 U.S. at 338; and (3) those that dilute legitimate votes. *See Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

However, the Court does *not* apply strict scrutiny to non-discriminatory regulations of the voting *process*. A principal reason is that, as the decision below observed, the Elections Clause grants the States the power to determine the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congressional oversight. *See* U.S. Const. art. I, § 4, cl. 1; *see also* Pet. App. 10. The Elections Clause also presupposes and reinforces the States' inherent power to regulate their own elections. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Particularly in light of the Elections Clause, the Court has consistently afforded States substantial leeway in regulating the mechanics of elections.

As noted, the Court set forth the balancing test courts should apply when reviewing a State's exercise of its Elections Clause authority in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," *i.e.* whether plaintiffs have alleged a significant burden on the right to vote. *See id.*

Courts must then identify and evaluate the state interests supporting the challenged law, including the "strength of each of those interests" and the extent to which they "make it necessary to burden the plaintiff's rights." *Id.* "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*

The Court explained this standard further in *Burdick v. Takushi*, 504 U.S. 428, 432 (1992), where it rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Rather, a "flexible" standard applies. *See id.* at 434. When voting rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, non-discriminatory restrictions' . . . 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (internal citations and quotations omitted).

In addition, *Burdick* made it clear that this flexible balancing test applies to laws affecting voting mechanics as well as those regulating ballots because the Court's precedents have "minimized the extent to which voting rights cases are distinguishable from ballot access cases." *Id.* at 438; *see also Tashjian*, 479 U.S. at 214 (applying balancing test to law restricting primary-election voting to registered party members); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (applying balancing test to law limiting the range of candidates that minor party could nominate).

Recently, in *Clingman v. Beaver*, 544 U.S. 581, 584 (2005), the Court confirmed the vitality of the *Anderson/Burdick* balancing standard when it upheld an Oklahoma law requiring voters to register as independents or with a party before voting in that party's primary. The

registration requirement involved a minimal burden at most—"[m]any electoral regulations, including voter registration generally, require that voters take some action to participate"—so strict scrutiny did not apply. *See id.* at 592-93. "[O]rdinary and widespread burdens," the Court reasoned, should not be deemed severe because that would "hamper the ability of the States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Id.* at 593. Such state election regulations are valid if reasonably related to the State's "important regulatory interests." *Id.* at 587.

This is an easier case than any of the foregoing because here, as the Seventh Circuit observed, "the right to vote is on both sides of the ledger." Pet. App. 6. That is, every improper vote cancels out a legitimate vote, both disenfranchising eligible voters and generally diluting the voting strength of the legitimate electorate. Pet. App. 6. Anti-fraud measures such as the Indiana Voter ID Law thus directly preserve the right to vote at full strength. *See Purcell v. Gonzalez*, __U.S.__, 127 S. Ct. 5, 7 (2006) (per curiam) (recognizing that voter-identification laws "prevent[] voter fraud" and consequent "'debasement or dilution of the weight of a citizen's vote'"). This renders strict scrutiny even less appropriate than it was in *Anderson*, *Burdick*, and *Clingman*.

Yet Petitioners implausibly suggest that *Purcell*, 127 S. Ct. at 7, which summarily reversed a Ninth Circuit injunction against Arizona's voter-identification law, somehow questioned the review applicable to voter-identification laws generally. Pet. 20-22. If anything, the Court in *Purcell* instructed lower courts to do exactly what the Seventh Circuit did here—to balance any negative effects on the right to vote against the States' compelling interest in preventing voter fraud. *See Purcell*, 127 S. Ct. at 7 ("Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental

political right' to vote."). *Purcell* restated and applied *Anderson/Burdick* balancing in a nutshell; it left no room for the inference that voter-identification laws are constitutionally distinct from other regulations of electoral mechanics.

B. The Indiana Voter ID Law is a non-discriminatory regulation of election procedures subject to *Anderson/Burdick* balancing

A requirement that voters present poll workers with commonly available photo identification is a reasonable means of regulating elections and preventing in-person voter fraud. It is no more a substantive or burdensome voting qualification than the prohibition on write-in voting that *Burdick* upheld as a "very limited" restriction. *See Burdick*, 504 U.S. at 437. Thus, not only is there no conflict over whether to apply *Anderson/Burdick* balancing to voter-identification laws, the lower courts are right to do so.

1. In criticizing the Seventh Circuit's ruling that the Voter ID Law does *not* impose a severe burden on the right to vote, Petitioners mischaracterize the court's reasoning. According to Petitioners, the court below said that States can prohibit certain persons from voting "until, and unless, an unspecified minimal number of voters are precluded from voting." Pet. 23. But the Seventh Circuit never suggested that a prohibition or a ban on voting is somehow acceptable if it applies only to a few voters. It said only that in assessing the severity of a burden imposed by a law that does not facially preclude anyone from voting (or even establish eligibility criteria), one factor is whether many people find it sufficiently inconvenient that it deters them from voting. Pet. App. 5-6. Thus, the court assessed the electoral "burden" by analyzing how "slight it is" *and* "the number of voters affected by it," which of course are overlapping, interrelated inquiries. Pet. App. 5.

This straightforward standard, properly described, is not remotely controversial, and even Petitioners, all of whom contend that the Voter ID Law disenfranchises many voters, do not disagree with it. Pet. 19. The Democrats even attempted to prove this burden, but lost that evidentiary issue with proof that was "utterly incredible and unreliable." Pet. App. 60 (also observing that "to the extent that [the report's] socioeconomic analysis is accurate, [it] revealed no disparate impact . . . based on a voter's race or education level" and only an insignificant impact based on income).

Even now Petitioners cannot point to a better way of measuring a burden's severity and do not otherwise attempt to explain *how* the Voter ID Law imposes a "severe" burden on the right to vote. To be sure, Petitioners repeatedly declare or presuppose this to be the case. Pet. 3, 14, 19, 24. But they have put forth no theory whatever as to why requiring voters to present government-issued photo identification—which their own data show to be possessed by 99% of the voting-age population, Pet. App. 69—is qualitatively or inherently a "severe" burden, while 30-day advance-registration laws and in-person-voting requirements are *not*.

Indeed, Petitioners expressly agreed below that some voter-identification laws, such as the requirements the Help America Vote Act ("HAVA") imposes on first-time voters who register by mail, are perfectly acceptable. Dem. C.A.7 Br. 46; Crawford C.A.7 Br. 45-46. Even the Petitions treat HAVA as a constitutional yardstick, a tool for flagging more restrictive voter-identification laws as constitutionally suspect. Pet. 15-19. No doubt Petitioners will explain this distinction by referring to the supposedly greater difficulties of obtaining a driver's license as compared with, say, a utility bill. *Cf.* Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1712 (codified at 42 U.S.C. § 15483(b)(2)(A)) (permitting first-time voters to prove identification with utility bills, bank statements, paychecks,

and government checks). But what constitutional principle allows voter identification by utility bills and bank statements but not drivers' licenses and passports?

2. Petitioners provide no plausible alternative to *Anderson/Burdick* balancing as a neutral rule for evaluating the Voter ID Law. Their proposed substitute, that an election regulation must be subjected to strict scrutiny if it causes even *one* qualified person to be unable to vote, cannot be correct. Pet. 25. Such a rule would require strict scrutiny of ordinary election laws, such as advance-voter-registration and in-person-voting requirements, that routinely deter or prevent untold numbers of legitimate, eligible voters from casting ballots. Subjecting every such election regulation to strict scrutiny would (a) constitutionalize a right to vote in the least restrictive manner and (b) put federal courts in the business of writing state election codes—in square conflict with the Elections Clause. Therefore, incidental deterrence of qualified voters, while unfortunate, cannot without more signal a "severe" burden on the right to vote.

The cases Petitioners rely on do not suggest otherwise—indeed, they fully support the analysis below. Petitioners cite *Anderson*, 460 U.S. at 792, for the proposition that a "serious and unreasonable burden may involve something short of absolute disfranchisement" because, in that case, the statute was "unconstitutional because it placed 'a particular burden' on Ohio's independent voters, not because it placed an impossible burden." Pet. 25 n.15. Similarly, they suggest that the decision below is inconsistent with *Smith v. Allwright*, 321 U.S. 649, 651 (1944), which held that excluding a single voter from a primary election on racial grounds violated the Fifteenth Amendment. Pet. 25-26. But in both cases, it was discrimination—in *Anderson* against independents and in *Smith* against a black voter—that made the burdens unconstitutional. In contrast, there is no plausible narrative of electoral discrimination here, and

Petitioners offer no alternative principle that would render the Voter ID Law constitutionally suspect.

3. As for the actual application of *Anderson/Burdick* balancing, there can be little doubt that, as with other routine election regulations, any incidental, marginal deterrence of legitimate voters is more than outweighed by the protection the Voter ID Law affords to legitimate voters as a whole. *See Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) (holding that the public interest in "permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote" outweighs the interest in permitting "every registered voter to vote freely"). This conclusion is particularly indubitable in light of Petitioners' failure to prove that any voters—individuals *or* groups—would suffer disenfranchisement as a result of the Voter ID Law. Pet. App. 5, 101.

The Petitions do not even bother to contest the notion that the balancing test yields a victory for the Voter ID Law. Petitioners do argue that "'a State may not dilute a person's vote to give weight to other interests,'" Pet. 25, but they ignore that the Voter ID Law exists *precisely* to prevent legitimate votes from being diluted by fraudulent ones.

III. These Cases Are Poor Vehicles For Reviewing Voter-Identification Laws

As the district court observed, these cases from the start have represented nothing more than politics by other means. Pet. App. 18 ("This litigation is the result of a partisan legislative disagreement that has spilled out of the state house into the courts."); *cf.* Pet. App. 11 (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

That motivation may well be present in many facial constitutional challenges that the Court hears, but usually there is at least one plaintiff who directly suffers from being regulated by the challenged law. Here, it bears repeating, none of the Petitioners could identify a single registered voter who would not or could not vote because of the Voter ID Law. Pet. App. 5, 101. As a result, Petitioners' standing to bring this case collapses in a heap. Furthermore, if voter-identification laws are proliferating nationally, the Court should have far better opportunities for reviewing such laws after the 2008 elections when granting review will not precipitate emergency, election-eve challenges, and when an actual record of enforcement experience can inform the Court's decision.

A. Standing remains a core uncertainty in both cases

The absence of any injured voters in these cases has made the search for Article III standing something of a parlor trick. The Democratic Parties and the political-interest groups, of course, are not directly regulated by the Law and have no voting rights of their own to assert. Pet. App. 46-49, 53-58. And while Crawford and Simpson could conceivably assert their own rights, they are not injured because they already have the required photo identification. Pet. App. 52-53. Both claim offense at having to show identification at the polls, but this is not cognizable Article III injury. Pet. App. 76 & n.48.

Nonetheless, the district court and the Seventh Circuit both found at least one party with Article III and prudential standing—though it is telling that those courts did not even remotely agree on the reasons. Substantial standing questions would remain even if the Court were to take the case.

1. The district court divined a theory of associational standing whereby the political-party plaintiffs and political-

candidate plaintiffs could assert the rights of hypothetical voters who *have* proper photo identification, but who might *forget* to take it to the polls. Pet. App. 78-79, 85.[3] The district court arrived at this theory only after rejecting every last one of the Petitioners' own arguments as to why they could represent the rights of individuals who actually lack proper identification. Pet. App. 73-96. The Democrats identified party supporters who supposedly did not have proper identification, but each of them either was entitled to vote absentee (where no identification is required) or already possessed proper identification.[4] Pet. App. 80-82. And the district court flatly rejected the notion that the Democrats could represent the interests of any voters who, without more, merely happen to want to vote for Democrat candidates. Pet. App. 77-79. The political-interest-group plaintiffs fared no better with their theory that they could assert the rights of hypothetical individuals the groups unilaterally presumed to protect. Pet. App. 92-95.

In light of these conclusions, the district court's alternative theory that the Democrats and candidates Crawford and Simpson have standing to represent "voters

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[3] The Democrats initially raised a claim that the Voter ID Law, as applied to primary elections, infringed their right of free association. The district court, however, ruled that the Democrats had abandoned that claim, Pet. App. 135, and the Democrats neither revived it on appeal nor presented it in their Petition. Respondents had always argued that, while the free-association claim itself was meritless, the Democratic Party at least had standing to raise it.

[4] The district court concluded that the Democratic Party could assert the *equal-protection* rights of these individuals insofar as it claimed that the Voter ID Law discriminates in favor of absentee voters and residents of nursing home polling places. Pet. App. 83. The Democratic Party did not plainly articulate a separate equal-protection claim on appeal, however, and they have not presented it as an issue in their Petition.

who have secured or could secure the necessary photo identification but, for some reason, will be unable to present such identification at the polls at the time of voting" is perplexing. Pet. App. 78-79. If anything, it makes less sense to hypothesize such happenstance injuries—and to empower political parties and candidates to raise them without consent of the voters—than it does to assume that some unspecified voters will be unable to obtain proper identification before an unspecified election.

The district court relied on *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004), which held that a political party could assert the rights of voters who "cannot know in advance that [their] names will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to human error by an election worker who mistakenly believes the voter is at the wrong polling place." But in that case, the plaintiffs challenged an interpretation of HAVA that would have allowed poll workers to deny provisional ballots based on an on-the-spot assessment of a voter's residency, which, in turn, would have rendered invalid provisional ballots cast in the wrong precinct by eligible voters. *See id.*

Here, in contrast, no voter who has proper identification but fails to produce it at a polling station is thereby denied the right to vote. The voter can retrieve the identification and return to the polls, or cast a provisional ballot that, after being properly validated, will be counted on the same terms as all other votes. *See* Ind. Code §§ 3-11-8-25.1(d); 3-11.7-5-1; 3-11.7-5-2.5. The provisional-ballot process does not inflict cognizable injury unless there is a constitutional right to vote in-person at the polling place (which there is not).

And, again, there is no reason to infer that the Democrats or candidates Crawford and Simpson would necessarily have the consent of any such hypothetical voters to assert their rights in this lawsuit. It may be that candidates can assert the

rights of their voting supporters in some cases, but only where the law they challenge regulates the candidates as such and not where, as here, the Law regulates the candidates only insofar as they are also voters. *Cf. Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003) (allowing candidate to assert free-speech rights of supporters in challenging a campaign-disclosure law); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973) (allowing candidate to assert rights of voters in challenging a resign-to-run law).

2. The Seventh Circuit did not even bother to comment on the district court's theory of standing. Instead, it cut right to the chase and theorized that the Voter ID Law would likely cause Democratic voters more harm than Republican voters, and thus the Democratic Party would likely have to work harder to get its "members" to the polls on election day. Pet. App. 3-4. The court made these inferences notwithstanding (1) the lack of any evidence showing any particular groups would be harmed by the Voter ID Law and (2) the express concession of the Indiana Democratic Party that it has no "members."[5] Dem. C.A.7 Br. 12, 27; Dem. C.A.7 Reply Br. 1-4.

The Seventh Circuit relied only on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), which held that a fair-housing-advocacy corporation suffered Article III injury if, as alleged, it devoted more resources to counteract racial-steering practices. Pet. App. 4. Key to the *Havens* holding, however, was the fact that Congress, by statute, had specifically bestowed upon "all" persons both a right to truthful information about housing and the right to sue violators regardless whether the injury arose from conduct that violated someone else's FHA rights. *See Havens*, 455

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[5] The other Democratic Party apparatus in the case, the MCDCC, does have members—four of them to be exact. Pet. App. 77. However, the MCDCC admitted that all four of its members have proper photo identification. Pet. App. 77.

U.S. at 373, 376 n.16. Here, unlike in *Havens*, no statute grants the Democrats (or any other plaintiff) a right that any defendant has violated. Furthermore, as the district court observed, *Havens* addressed standing based on an assumption about expenses *already* incurred because of a defendant's *violations* of a statute, not expenses an organization might hypothetically one day undertake in response to a defendant's *enforcement* of a statute. Pet. App. 87-88.

The Seventh Circuit admitted that standing was even "less certain" for the remaining Petitioners. Pet. App. 4. Substantial Article III and prudential standing questions thus remain. In all events, the Court should wait for a voter-identification case where it is sure to be able to reach the merits.

B. The 2008 elections are a reason to *deny* review

Petitioners argue a need for immediate review prior to the 2008 national elections, but they neglect the countervailing significance of the 2008 primaries. Pet. 15. By the end of February 2008, well before this case would be decided on plenary review, 24 States and the District of Columbia will already have held presidential primaries. *See* 2008 Presidential Nominating Calendar, *available at* http://www.nass.org/index.php?option=com_docman&task=doc_download&gid=92 (last visited August 2, 2007). Fourteen of these States require some form of identification for all voters, and the rest require identification of first-time voters who register by mail, per HAVA. *See* Voter ID Laws, *available at* http://www.electionline.org/Default.aspx?tabid=364 (last visited July 29, 2007). Granting review here would create new uncertainty as to the validity of all voter-identification requirements, far more uncertainty than exists now when the only federal circuit to review a voter photo-identification law has upheld it.

Such uncertainty may well encourage additional pre-enforcement challenges to voter-identification procedures in the months and weeks preceding the 2008 primaries. In past elections, such challenges have generated conflicting last-minute court decisions along with electoral confusion. *See N.E. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) (vacating district court's temporary restraining order issued 12 days before November 2006 election against Ohio absentee-voting identification requirements); *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 549-51 (6th Cir. 2004) (staying district-court injunctions issued one and two days before November 2004 election against Ohio polling-place challengers); *Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004) (Stevens, J., as Circuit Justice) (denying for "prudential reasons" eleventh-hour applications to vacate *Summit County* stays).

This mode of adjudicating election laws quite obviously interferes with States' "compelling interest in preserving the integrity of [their] election process." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (holding that federal courts should "reasonably endeavor to avoid a disruption of the [States'] election process" when fashioning injunctive relief). Accordingly, in *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5, 7 (2006) (per curiam), the Court discouraged last-minute challenges to state election procedures when it vacated an injunction against Arizona's voter-identification law. The Court recognized both the "necessity for clear guidance to the State of Arizona," and the reality that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.*

Accordingly, if the Court is interested in finding the optimal time for reviewing a voter-identification law, it

should wait until *after* the 2008 elections. That way, at least, the mere pendency of review will not cast States and voters into turmoil and litigation that may itself depress turnout.

C. A later case may provide useful operational data

If the Court were ever interested in reviewing voter-identification laws, it would be better off to wait for a later case for the additional reason that there is no formal record here of the Indiana Voter ID Law's operational impact. Since this litigation began, to be sure, Indiana has implemented its Voter ID Law, and published reports suggest that voter turnout in Indiana *increased* by 2% in the November 2006 election as compared with the November 2002 election. *See* Ind. Sec'y of State, 2002 General Election Turnout & Registration, *available at* http://www.in.gov/apps/sos/election/general2002/general2002?page=turnout (last visited July 31, 2007); Ind. Sec'y of State, 2006 General Election Turnout & Registration, *available at* http://www.in.gov/sos/elections/2006%20Municipal%20Registration%20and%20Turnout.pdf (last visited July 31, 2007). But when it was filed, this case represented a pre-enforcement challenge, so no such operational data is in the record. To the extent the actual impact of voter- identification laws may be relevant, therefore, this particular case is not ripe for review.

A voter-identification case with a more complete record could arrive if all such laws operate unimpeded through the 2008 election cycle. At least then *some* data may be available to assess the alleged burden of such laws. *See Purcell*, 127 S. Ct. at 8 (rejecting plenary review because "the facts in these cases are hotly contested" and the inquiry is fact dependent); *id.* (Stevens, J., concurring) (observing that letting the challenged law operate would aid a "correct[]" resolution "on the basis of historical facts rather than speculation"). Here, however, the Court has only the speculative protests of the Law's political opponents.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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